ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 02-1244

Consolidated with Case Nos.
02-1246, 02-1247, 02-1248, 02-1249

BEETHOVEN.COM, et al.,
Petitioners,

v.

THE LIBRARIAN OF CONGRESS,
Respondent.

On Petition to Review an Order of the Librarian of Congress

JOINT AMENDED BRIEF FOR PETITIONERS RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

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July 8, 2003

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Petitioners Recording Industry Association of America, Inc. ("RIAA"), the American Federation of Radio and Television Artists ("AFTRA"), and the American Federation of Musicians of the United States and Canada ("AFM") (collectively "Owners and Performers") certify as follows:

A. PARTIES AND AMICI

The parties that appeared before the Copyright Arbitration Royalty Panel ("CARP") and the Librarian of Congress in the proceeding below were as follows:

RIAA, AFM, AFTRA, Association for Independent Music, BET.com, Comedy Central, Echo Networks, Inc., Listen.com, Live365.com, MTVi Group, LLC, Myplay, Inc., NetRadio Corp., Radio Active Media Partners, Inc., RadioWave.com, Inc., Spinner Networks, Inc., XACT Radio Network, LLC, Susquehanna Radio Corp., Clear Channel Communications Inc., Entercom Communications Corp., Infinity Broadcasting Corp., Salem Communications Corp., National Religious Broadcasters Music License Committee ("NRBMLC"), National Public Radio and DMX/AEI Music Inc.[1]

Parties from the proceeding below appearing before this Court as Petitioners and Intervenors include RIAA, AFM, AFTRA, Live 365.com, Salem Communication Corp., and NRBMLC.

A number of entities that filed petitions for review in this consolidated appeal chose not to appear before the CARP or the Librarian of Congress ("Librarian") in the proceeding below.

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[1] Parties that withdrew during the proceeding are not listed.

Those parties include: Beethoven.com, LLC, Educational Information Corp. (WCPE(FM)), Inetprogramming, Inc., Internet Radio Hawaii, and Wherever Radio.

B. RULINGS UNDER REVIEW

The ruling of the Librarian of Congress under review is published as Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule and Order, 67 Fed. Reg. 45239 (July 8, 2002), *aff'g in part and rev'g in part*, In re Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Royalty Panel, Docket No. 2000-9 CARP DTRA 1 & 2 (unpublished) (http://www.copyright.gov/carp/webcasting_rates.pdf.) (Feb. 20, 2002) (redacted version).

C. RELATED CASES

The ruling under review has not been considered previously by this or any other Court. Petitioners are not aware of any directly related cases currently before this or any other Court. The only case Petitioners are aware of that could have an impact on this case is *Bonneville Int'l Corp. v. Peters*, Appeal No. 01-3720, Civ. Action No. 01-408 (3d Cir.), in which a number of FCC-licensed terrestrial broadcasters who simulcast their broadcast streams over the Internet have appealed the Copyright Office's decision rejecting their claim that they are exempt from the payment of royalties under Section 114 of the Copyright Act. The Copyright Office's decision was upheld in *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001), and is now awaiting decision before the United States Court of Appeals for the Third Circuit.

CORPORATE DISCLOSURE STATEMENTS

The following corporate disclosure statements are submitted in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and the rules of this Court:

The Recording Industry Association of America, Inc.

RIAA is an incorporated, non-profit trade association whose member companies create, manufacture and/or distribute approximately 90 percent of all legitimate sound recordings produced and sold in the United States. RIAA does not have any parent company and is not publicly traded, nor does any publicly traded company have a 10 percent or greater interest in RIAA. However, several of RIAA's member companies and several of the record companies within the collective represented by RIAA are publicly traded or are affiliates of publicly traded companies. Upon request by the Court, RIAA will provide the names of those publicly traded companies.

American Federation of Musicians of the United States and Canada

AFM is a nonprofit mutual benefit corporation organized under the Nonprofit Mutual Benefit Corporation Law of the State of California. It has no parent corporations and no stock owners.

American Federation of Television and Radio Artists

AFTRA is an unincorporated association. It has no parent corporation and no stock owners.

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GLOSSARY

AFM	American Federation of Musicians of the United States and Canada
AFTRA	American Federation of Television and Radio Artists
AFIM	Association for Independent Music
Benchmark Agreements	Voluntary agreements negotiated between RIAA and 26 separate webcasters
Broadcasters	The FCC-licensed broadcasters that were parties to the CARP Proceeding: Susquehanna Radio Corp., Salem Communications Corp., Clear Channel Communications Inc., Entercom Communications Corp., Infinity Broadcasting Corp., and the stations of the National Religious Broadcasters Music License Committee
CARP	Copyright Arbitration Royalty Panel
CARP Report	In re: Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Royalty Panel, No. 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2003) (unpublished)
CRT	Copyright Royalty Tribunal
Copyright Owners and Performers	RIAA, AFM and AFTRA
DiMA	The Digital Media Association
DMCA	Digital Millennium Copyright Act
DPRA	Digital Performance Right in Sound Recordings Act of 1995
FCC	Federal Communications Commission
Librarian	Librarian of Congress
Librarian's Decision	Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule and Order, 67 Fed. Reg. 45239 (dated June 20, 2002, published July 8, 2002)
NAB	National Association of Broadcasters
NRBMLC	National Religious Broadcasters Music License Committee
Office	Copyright Office
Owners and Performers	RIAA, AFM and AFTRA
PES Decision	Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings; Final Rule, 63 Fed. Reg. 45239 (May 8, 1998)

Petition to Modify	Petition of the Copyright Owners and Performers to Modify the Report of the CARP, Docket No. 2000-9 CARP DTRA 1 & 2 (March 6, 2002)
Register	Register of Copyrights
RIAA	Recording Industry Association of America, Inc.
RIAA Negotiating Committee	Committee of record company executives that oversaw RIAA statutory license negotiations
RIAA PFOF	RIAA Proposed Findings of Fact and Conclusions of Law
Services	Statutory licensees that participated in CARP proceeding
SWSA	Small Webcaster Settlement Act of 2002
Webcasters	The Webcasters that were parties to the CARP proceeding: BET.com, Comedy Central, Echo Networks, Inc., Listen.com, Live365.com, MTVi Group, LLC, Myplay, Inc., NetRadio Corp., Radio Active Media Partners, Inc., RadioWave.com, Inc., Spinner Networks, Inc., and XACT Radio Network, LLC
115 Label Agreements	115 record industry agreements for the digital performance and reproduction of sound recordings negotiated in the marketplace between willing buyers and willing sellers

STATEMENT OF JURISDICTION

This case involves a petition for review of the Final Rule and Order of the Librarian of Congress in Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45240 (July 8, 2002) ("Librarian's Decision"). This final order, issued pursuant to 17 U.S.C. §§ 114(f), 112(e) & 802(f) (1998), disposed of all claims with respect to all parties. On August 7, 2002, RIAA, AFM and AFTRA (collectively "Owners and Performers") timely filed petitions for review under 17 U.S.C. § 802(g), which vests this Court with exclusive appellate jurisdiction.

STATEMENT OF ISSUES

1. Whether, in establishing a benchmark to set rates for the digital performance of sound recordings and the reproduction of ephemeral copies, the Librarian of Congress ("Librarian") arbitrarily failed to consider record evidence of a) overwhelming corroboration of RIAA's proposed benchmark in 115 record industry agreements for the digital performance and reproduction of sound recordings negotiated in the marketplace between willing buyers and willing sellers, outside of the statutory license ("115 Label Agreements"), and b) the rates and terms of 25 licensing agreements between RIAA and a wide variety of webcasters reached during and after the voluntary negotiation period mandated by Congress ("Benchmark Agreements"), which involved the *same buyers*, *sellers*, *rights*, *copyrighted works*, *time period* and *medium* as the marketplace negotiation that Congress charged the Copyright Arbitration Royalty Panel ("CARP") to replicate?

2. Whether, in arbitrarily upholding the CARP's decision to set the annual minimum fee for eligible nonsubscription services at only $500 when the typical fee in the Benchmark

Agreements was at least $5,000, the Librarian acted contrary to record evidence and congressional policy?

3. Whether, in establishing terms, the Librarian arbitrarily postponed the due date for royalty payments in arrears without record support and contrary to the payment date established in 17 U.S.C. § 114(f)(4)(C)?

STATUTES INVOLVED

This case involves provisions of Sections 101, 102, 106, 112 and 114 and Chapter 8 of the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq., and the regulations established by the Librarian's Decision and found at 37 C.F.R. § 261. *See* Statutory Appendix.

STANDARD OF REVIEW

This Court may "modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner." 17 U.S.C. § 802(g). Although the Librarian's decision is accorded "wide" deference, *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 924 (D.C. Cir. 1998) ("*NAB v. Librarian*"), "this Court is required to uphold an award only when the Librarian's final award . . . bears a rational relationship to the record evidence, is plausibly explained, and is otherwise developed in a manner that does not plainly contravene applicable statutory provisions." *Recording Industry Ass'n of Am., Inc. v. Librarian of Congress*, 176 F.3d 528, 535 (D.C. Cir. 1999) ("*RIAA v. Librarian*"), *citing NAB v. Librarian*, 146 F.3d at 924 (internal quotations omitted).

This Court will "set aside a royalty award . . . [if] the Librarian acted in an arbitrary manner in ratifying the Panel's action." *NAB v. Librarian*, 146 F.3d at 923 (internal quotations omitted). The Librarian "would plainly act in an arbitrary manner if, without explanation or

adjustment, he adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award," *id.*, or "if he approved an award proposed by the Panel that unmistakably contravened applicable provisions of title 17 or if he himself transgressed unequivocal statutory commands." *Id.* at 924.

Terms imposed by the Librarian are arbitrary if the Librarian acted "without regard to the record." *See RIAA v. Librarian*, 176 F.3d at 536. "It is not enough for the Librarian simply to offer a plausible explanation for his actions; there must be record evidence to support the terms imposed." *Id.* at 535. Even a decision "based principally on sound judgment . . . must be properly raised before the arbitration panel so the parties have a fair opportunity to address it, and so that the Librarian has the benefit of the parties' view before reaching a judgment." *Id.* at 536.

STATEMENT OF THE CASE

Introduction

This case involves the first time in the history of United States copyright law that any administrative body determined the fair market value of a sound recording performance right. Sound recordings result from "the fixation of a series of musical, spoken, or other sounds," 17 U.S.C. § 101. Section 114 of the Copyright Act provides that eligible nonsubscription services ("webcasters") have a statutory license for certain digital performances of copyrighted sound recordings. Section 112(e) includes a compulsory license for temporary or "ephemeral" copies needed to facilitate transmissions of sound recordings. Librarian's Decision at 45240 (J.A.____).

Sections 112(e) and 114 deprive sound recording copyright owners of a fundamental right of copyright ownership – the right to negotiate rates and terms with webcasters that wish to

exploit their copyrighted sound recordings. Sections 112(e) and 114 compel copyright owners to license their works to any eligible nonsubscription service that files a form with the Copyright Office ("Office") and abides by certain statutory conditions. Filing the form grants the webcaster the right, without securing consent, to transmit over the Internet any of hundreds of thousands of copyrighted sound recordings, which cost billions of dollars to produce.

As some compensation for this broad statutory license, Sections 112(e) and 114 provide copyright owners and performing artists with the right to receive the compensation they would have received had they been able to negotiate with webcasters in a free marketplace absent a compulsory license. Section 114(f)(2)(B) requires the CARP to establish "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[2]

A. The Parties

The Owners and Performers participated in the proceeding below on behalf of the royalty recipients from the Section 112 and 114 statutory licenses. The Section 114 royalties are shared equally between recording companies, as copyright owners, and recording artists. *See* 17 U.S.C. § 114(g)(2).

RIAA is the trade association that represents the U.S. recording industry. RIAA's member record companies create, manufacture and/or distribute approximately 90 percent of all legitimate sound recordings produced and sold in the United States. SoundExchange is an unincorporated division of RIAA[3] that administers the Section 112 and 114 statutory licenses on

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[2] Section 112(e)(4) contains similar provisions.

[3] It is expected that SoundExchange will be spun off into a separate entity.

behalf of the vast majority of U.S. sound recording copyright owners and performers. Librarian's Decision at 45266-67 (J.A.____). AFM represents over 110,000 musicians, including approximately 10,000 musicians who work in the recording industry as featured artists or background musicians. AFTRA represents over 80,000 performers and newspersons employed in the news, entertainment, advertising and sound recording industries, including featured artists and background singers who appear as vocalists on sound recordings.

Several categories of eligible nonsubscription services (collectively, "Services") participated in the proceeding below. The Webcasters are Internet services that stream sound recordings and other content over the Internet, and the Broadcasters are commercial AM or FM radio stations, licensed by the Federal Communications Commission, that generally simulcast their over-the-air programming over the Internet. The Services that participated in the proceeding below are identified in the Certificate of Parties. *See also* CARP Report at 2-4 (J.A.____).

B. The Statutory Framework

The Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") created a new exclusive right "to perform sound recordings publicly by means of a digital audio transmission." 17 U.S.C. § 106(6). The DPRA also gave certain subscription services a statutory license for performances. 17 U.S.C. § 114(f). In 1998, the Digital Millenium Copyright Act ("DMCA") amended Section 114, clarifying coverage of webcasters that make eligible nonsubscription transmissions. *See* 17 U.S.C. § 114(d)(2). As the *quid pro quo* for granting webcasters the privilege of statutory licensing, the DMCA mandated that webcasters pay royalty rates that meet the willing buyer/willing seller test, and thus directed the CARP to ensure that webcasters pay fair market value. The DMCA also provided that, in setting willing

buyer/willing seller rates, the CARP "shall base its decision on economic . . . information presented by the parties," and "may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated" for the statutory licenses. 17 U.S.C. § 114(f)(2)(B). The CARP is also instructed to establish minimum fees for eligible nonsubscription services. *Id.*

C. The Proceeding Below

1. The Course of the Proceeding

These proceedings began in 1998, when the Librarian initiated a voluntary negotiation for the period October 28, 1998 through 2000. In 2000, the Librarian initiated a six-month negotiation period covering 2001-2002. Librarian's Decision at 45241 (J.A.____); *see* 17 U.S.C. §§ 112(e)(4) & 114(f)(2)(A).

RIAA, through its Negotiating Committee of record company executives with significant experience in new media and Internet deals, negotiated 26 agreements with webcasters during and subsequent to the voluntary negotiation periods. RIAA, however, was unable to negotiate an industry-wide settlement, or agreements with certain key webcasters, that likely would have avoided a CARP.[4]

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[4] This inability is unsurprising given the lack of incentive for statutory licensees to negotiate. Licensees could use sound recordings for their businesses and wait years for the outcome of the CARP without ever having to negotiate with RIAA. By refusing to enter into voluntary agreements, licensees could in effect receive interest-free loans from copyright owners and performers. Petition of the Copyright Owners and Performers to Modify the Report of the CARP, Docket No. 2000-9 CARP DTRA 1 & 2 (March 6, 2002) ("Petition to Modify") at 9 (J.A.____).

Moreover, at the time RIAA was engaged in negotiations, the Digital Media Association ("DiMA"), the trade association for webcasters, began preparing for litigation and encouraging webcasters to join the DiMA "team" rather than to negotiate. Proposed Findings of Fact and Conclusions of Law ("RIAA PFOF") at ¶ 193, *citing* RIAA Exhibit Nos. 150 DP-152 DP (J.A.____).

On December 4, 2000, the Office consolidated the CARP proceedings for these two license periods. Librarian's Decision at 45241 (J.A.____). The parties filed written direct cases with witness statements and rate requests on April 11, 2001. The CARP conducted 41 days of direct and rebuttal case hearings, involving 75 witnesses, including seven of the 26 RIAA licensees. CARP Report at 11, 16, and 26 (J.A.____).

2. Benchmarks, Rates and Terms Proposed by the Parties

The Librarian has stated that the "first step" in establishing rates for a compulsory license is to consider as benchmarks "rates negotiated in comparable marketplace transactions." These benchmarks are considered "marketplace point[s] of reference, and as such need not be perfect in order to be considered in a rate setting proceeding." Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 63 Fed. Reg. 25394, 25399 and 25404 (May 8, 1998) ("PES Decision"). Thus, some differences between the market reflected in a proposed benchmark and the market being replicated can be accommodated by adjusting the rates reflected in the benchmark. However, fundamental differences between markets result in the rejection of a proposed benchmark. *Id.* at 25401-03.

Consistent with this precedent, the Owners and Performers structured their cases around establishing a marketplace benchmark that the CARP could use to set rates and terms. They offered as benchmarks the voluntary agreements that RIAA negotiated with 26 webcasters (the "Benchmark Agreements") and demonstrated that the Benchmark Agreements involved the *same buyers*, the *same sellers*, the *same rights*, the *same copyrighted works*, the *same time period* and the *same medium* as those in the marketplace negotiation that the CARP was required to replicate.

These Benchmark Agreements had annual minimum fees that ranged up to several hundred thousand dollars, and the most common minimum fee was $5,000. *See* RIAA PFOF App. A at 16-22. RIAA agreed to one annual minimum fee of $500 for a small webcaster that relied primarily on non-RIAA member sound recordings.

RIAA introduced evidence corroborating the Benchmark Agreements, including 115 record label licensing agreements (the "115 Label Agreements") that were the product of free-market negotiations (*i.e.*, negotiations unconstrained by a statutory license) between individual record companies and individual licensees (including many webcasters). These agreements licensed sound recording performance and reproduction rights for new media (*e.g.*, nonsubscription webcasting, subscription webcasting, promotional webcasting, and music videos) and traditional media (*e.g.*, compilations and soundtracks). The rates in these marketplace agreements demonstrated that the rates in the Benchmark Agreements represented the range of rates that willing buyers and willing sellers would have agreed to in the marketplace.

The Services offered as their benchmark a theoretical model prepared by an economist based on royalty payments for over-the-air broadcast of musical works.[5] Librarian's Decision at 45246. Thus, the Services' benchmark involved a *different market*, *different copyrighted works*, *different sellers* and *different buyers* than the marketplace the CARP was charged to replicate in setting rates; this model ultimately was rejected by both the CARP and the Librarian.

The parties' rate requests varied greatly. The proposal of the Owners and Performers included:

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[5] Musical works are the notes and lyrics of a song. They are distinct from sound recordings. 17 U.S.C. §§ 101 & 102(a)(2),(7).

- A per performance royalty of 0.4 cents per transmission of a sound recording to a single listener;
- A $5,000 per service annual minimum fee; and an
- Ephemeral license fee of 10 percent of the performance royalty per service.

The Services' proposal included:

- A per performance royalty of 0.014 cents per performance or a per hour fee of 0.021 cents;
- A $250 per service annual minimum fee; and
- No additional license fee for ephemeral copies.

Librarian's Decision at 45241-42 (J.A.____).

D. The CARP Report

The CARP submitted its Report to the Librarian on February 20, 2002. (J.A.____.)

1. CARP Decision on Benchmark

Consistent with both the terms of the statute and prior precedent, the CARP found that the Benchmark Agreements reflected "the next closest approximation of the hypothetical market" that the CARP must replicate. CARP Report at 46 (J.A.____). It also found that the Agreements "*generally* provide Section 114(f)(2) webcaster rates of 0.4 cents per performance." *Id.* at 47 (J.A.____). Nevertheless, the CARP, by adopting an improperly narrow approach to "comparab[ility]" under Section 114(f)(2)(B), essentially refused to rely upon 25 of the Benchmark Agreements as a benchmark, even though they contained negotiated rates for the Section 112 and 114 licenses. The CARP made no effort to adjust the rates in the 25 Benchmark Agreements to reflect perceived differences between those agreements and the market the CARP was required to replicate. Instead, the CARP essentially relied only on the agreement between RIAA and Yahoo!.

The CARP summarily dismissed the extensive corroborating economic evidence proffered by RIAA, including the 115 Label Agreements, which provided critical evidence of free market negotiations for the use of sound recordings in comparable circumstances. *Id.* at 60 (J.A.____).[6] The CARP made no effort to adjust the Benchmark Agreements to address the range of rates reflected in the 115 Label Agreements.

2. CARP Decision on Rates

The CARP used the Yahoo! agreement as a benchmark to set royalty rates that are considerably lower than the rates found in the other 25 Benchmark Agreements and in the 115 Label Agreements. For Internet-only webcasters, the CARP found that the range of rates in the Yahoo! agreement was between 0.083 cents and 0.2 cents per performance; it set the rate for such performances at the midpoint of 0.14 cents per performance. For Broadcasters that simulcast their over-the-air programming over the Internet, the CARP determined that the range of rates in the Yahoo! agreement was between 0.05 cents and 0.083 cents per performance, and adopted a rate at the midpoint of 0.07 cents per performance. CARP Report at 75-78 (J.A.____).[7] The CARP did not adjust these rates to reflect the considerably higher rates found in the 25 Benchmark Agreements or in the 115 Label Agreements.

The CARP set the annual minimum fee at $500, which was much lower than the typical $5,000 minimum fee found in the Benchmark Agreements and had only been granted to one small webcaster. The CARP assumed that RIAA would not negotiate a minimum fee that failed

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[6] The CARP also rejected the Services' musical works/broadcast radio benchmark, finding that this "theoretical model" involved different technologies, different buyers and sellers, different copyrights, and different markets. CARP Report at 39-40 (J.A.____).

[7] Yahoo!'s webcasting service involved both Internet-only webcasts and retransmissions of over-the-air radio stations.

to cover administrative costs and the value of access to all works up to the cost of the minimum fee. CARP Report at 95 (J.A.____).

3. CARP Decision on Terms

On February 1, 2002, the Owners and Performers and the Services submitted nearly identical proposed terms to the CARP, which had requested proposed joint terms. The CARP accepted all terms on which the parties agreed, finding that this agreement met the statutory standard of representing the terms a willing buyer and willing seller would have negotiated in the marketplace. CARP Report at 133 and n.80 (J.A.____). The CARP resolved the only disputed issues by adopting additional definitions, and by appointing SoundExchange the Designated Agent for copyright owners who failed to designate one. CARP Report at 132-34 (J.A.____).

E. The Librarian's Decision

The Copyright Act directs the Librarian, on the recommendation of the Register of Copyrights ("Register"), to review the CARP decision and either adopt it, or reject it and "after full examination of the record created in the arbitration proceeding . . . issue an order setting the royalty fee." The Librarian must adopt the CARP Report "unless . . . the determination is arbitrary or contrary to the applicable provisions of this title." 17 U.S.C. § 802(f). The Librarian considers this standard equivalent to the "arbitrary" standard under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Librarian's Decision at 45242 (J.A.____).

Pursuant to 37 C.F.R. § 251.55, the parties filed petitions on March 6, 2002, asking the Librarian to modify the CARP recommendations. On May 21, 2001, the Librarian rejected the CARP Report. Order in Docket No. 2000-9 CARP DTRA 1 & 2 (May 21, 2002) (J.A.____). On June 20, 2002, the Office issued, and the Librarian adopted, the recommended "Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral

Recordings." (J.A.____.)[8] The determination was published in the Federal Register on July 8, 2002. 67 Fed. Reg. 45240 (July 8, 2002) (J.A.____).

1. Librarian's Decision on Royalty Rates

The Register recommended that the Librarian reject several CARP determinations and set lower rates:

- Instead of the proposed rate of 0.14 cents per performance for Internet-only transmissions and 0.07 cents per performance for radio retransmissions under the Section 114 license, the Librarian set a unitary rate of 0.07 cents per performance, and
- In place of the proposed ephemeral license fee of 9 percent of performance royalties, the Librarian set the rate at 8.8 percent.

Librarian's Decision at 45243 (J.A.____).

The Register concluded that, although on its face the Yahoo! agreement contained different rates for Internet-only and radio retransmission webcasts, the CARP's recommendation adopting this dual rate structure was arbitrary. Instead, the Register developed a unitary rate by calculating "blended" rates for both types of webcasts. She treated the blended rates as the boundaries of a "zone of reasonableness," and took the midpoint of the zone as the unitary rate for all transmissions. Although the average of these two rates is 0.074 cents per performance, the Register arbitrarily rounded that figure to the nearest hundredth to reach a unitary rate of 0.07 cents per performance, a reduction of more than 5 percent. *Id.* at 45255 (J.A.____).

The Register also recommended a lower rate for the ephemeral statutory license. The CARP determined that ephemeral rates in those of the 26 Benchmark Agreements that included such a rate fell in a range between 8.8 and 10 percent of the performance fees paid. It relied

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[8] Most of the "Librarian's Decision" is written in the voice of the Register. At the conclusion of the Register's recommendations, the Librarian adopts them as his final determination.

heavily on the 8.8 percent figure, derived from the Yahoo! agreement, but gave "very modest effect" to the Benchmark Agreements with ephemeral rates of 10 percent by rounding the ephemeral rate to 9.0 percent. Despite the CARP's step-by-step description of its methodology, CARP Report at 99-104 (J.A.____), the Register found that the CARP had not offered a clear explanation for its reliance on the ephemeral rates from the non-Yahoo! Benchmark Agreements, and that "[c]onsidering those agreements is clearly arbitrary." The Register recommended setting the ephemeral rate for Section 114 licensees at 8.8 percent. Librarian's Decision at 45261-62 (J.A.____).

In refusing to treat any of the Benchmark Agreements other than the Yahoo! agreement as a benchmark, the Register went beyond even the CARP's limited use of these Agreements. Contrary to prior precedent, the Register made no effort to adjust the rates in those Agreements to address any perceived flaws. Similarly, the Register, in a single paragraph, summarily approved the CARP's refusal to consider the 115 Label Agreements, despite the Copyright Act's instruction to consider economic evidence of marketplace negotiations.

The Register nevertheless kept the minimum fee based on the $500 minimum fee from a rejected Benchmark Agreement, citing the CARP's finding that RIAA "would not agree to a minimum rate that would result in a loss" and would have required a higher fee had $500 not covered administrative costs and the value of access. Librarian's Decision at 45263 (J.A.____). The Register failed to respond to concerns that 1) the low minimum fee ignores the broad range of rates included in the licenses negotiated in the marketplace, where a $5,000 minimum fee is typical, and 2) using an atypical, low fee will discourage copyright owners from accommodating special circumstances with low minimum fees. *See id.* at 45263-64; *see also* Petition to Modify at 43-45 (J.A.____).

2. Librarian's Decision on Terms

In considering terms, the Register recommended changes to terms that none of the parties to the proceeding had sought to have modified or added, in some cases disrupting aspects of the agreed terms that had been the subject of difficult negotiations and compromises among the parties. Among other actions, the Register recommended these terms, without citing any record support:

- That the deadline for making royalty payments in arrears covering the period from October 28, 1998 through September 1, 2002 (instead of July 8, 2002) be delayed for two months beyond the payment deadline provided in Section 114(f)(4)(C) of 45 days after the royalty rates were set; and
- That the effective date for the new royalty rates be delayed to September 1, 2002.

Librarian's Decision at 45271 (J.A.____).

The Register explained that delayed payments would be useful to licensees who needed time to arrange royalty payments, *id.*, without acknowledging the unfairness of forcing Owners and Performers, who do not receive interest on royalty payments in arrears, to wait an additional two months to get the royalty payments that they had in some cases been owed since October 28, 1998.

SUMMARY OF ARGUMENT

1. The Copyright Act provides that, in setting the "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller," the CARP must consider the economic and competitive information presented by the parties and may consider comparable "voluntary license agreements" for the statutory licenses at issue in this case. 17 U.S.C. §§ 112(e)(4) and 114(f)(2); CARP Report at 43. The central issue in this appeal is whether the extremely high standards the

Librarian set for consideration of such evidence effectively reads these provisions out of the Copyright Act.

In this instance, the Librarian arbitrarily rejected the vast majority of the Benchmark Agreements that the RIAA introduced, together with all corroborating evidence, including 115 Label Agreements demonstrating that the rates reflected in the rejected Benchmark Agreements were an accurate reflection of rates that a willing buyer and a willing seller would negotiate in a free marketplace. The Librarian's arbitrary action led him to adopt a range of so-called reasonable rates that was much lower than it would have been had the full complement of Benchmark Agreements and corroborating evidence been taken into account. As a result, he set royalty rates that were significantly lower than those that would have been negotiated in a marketplace not constrained by a statutory license.

The Librarian's statement, in a footnote, summarily rejecting the 115 Label Agreements was particularly glaring, because the Librarian provided no substantive basis for his action. RIAA offered the 115 Label Agreements to show the rates that result when record labels – the "willing seller" in the hypothetical marketplace the CARP must replicate – enter into negotiations with individual licensees (including various webcasters) for the use of sound recordings in marketplaces not constrained by a statutory license. The Librarian provided no rationale for rejecting this evidence out of hand. The CARP's explanation – in a single paragraph – that these agreements are not "useful benchmarks" because they involved "different rights" reflects a fundamental misunderstanding of RIAA's purpose in introducing this evidence. RIAA never suggested that these agreements encompassed the precise rights at issue in this case – although many involve the performance of sound recordings – or that they themselves should be viewed as benchmarks. Instead, the 115 Label Agreements are corroborating evidence of the

rates in the Benchmark Agreements and thus support those rates as a benchmark. This is precisely the type of "economic [and] competitive . . . information" that the Copyright Act requires the CARP to consider.

Similarly, in rejecting 25 of the 26 Benchmark Agreements as benchmarks, the Librarian set a standard for "comparability" so high that it essentially closes the door on congressionally mandated voluntary negotiations with all but the largest webcasters who are part of billion-dollar companies. These 25 Agreements involved the same rights, negotiated in the same market. Consistent with prior precedent, *see* PES Decision at 25409-10, the Librarian should have considered the rates in these comparable agreements as benchmarks, and adjusted those rates to reflect any significant disparities.

By selecting a single agreement out of RIAA's proposed benchmarks, while ignoring the entire range of rates and terms from comparable agreements, the Librarian arbitrarily read out of Section 114 both the congressional instruction for the parties to attempt to resolve disputes by negotiation and Congress's explicit reference to the use of voluntary agreements negotiated under the statutory license in establishing rates and terms. No party will have an incentive to negotiate and make concessions to reach agreement if the only result is to have the lowest rates and least favorable terms selectively used against it in a CARP proceeding.

Had the Librarian considered both the 115 Label Agreements and all of the Benchmark Agreements, the resulting "zone of reasonableness" used to set the rates would have better reflected what "would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B).

2. The Librarian arbitrarily upheld the CARP's establishment of an annual minimum fee of $500 for eligible nonsubscription services based on an atypically low fee in a single

Benchmark Agreement (that the Librarian rejected as a benchmark for establishing performance royalties) when the evidence demonstrated that $5,000 was the typical minimum fee over the range of such fees established in the Benchmark Agreements. This decision was contrary to both past precedent on the selection of a rate within a range and congressional policy encouraging voluntary negotiations. Copyright owners will be unwilling to tailor voluntary agreements to fit the needs of a particular licensee if such arrangements will be used against them in setting rates for the entire industry.

3. The Librarian arbitrarily adopted a term that delayed the date for licensees to make royalty payments in arrears, thus extending the period since October 28, 1998 during which licensees were permitted to exploit copyrighted sound recordings without paying royalties. This term, which amounts to a statutorily imposed interest-free loan, is improper for two reasons. First, it is contrary to an explicit statutory provision setting the date for payment of these royalties "on or before the twentieth day of the month next succeeding the month in which the royalty fees are set." 17 U.S.C. § 114(f)(4)(C).[9] Second, this term fails to "bear a rational relationship to the record evidence." *NAB v. Librarian*, 146 F.3d at 924. There is no mention of this term in the lengthy evidentiary record of the proceeding.[10]

4. This Court should (1) vacate the Librarian's Decision insofar as it establishes royalty rates for eligible nonsubscription services, and remand that rate determination with instructions to give full consideration to the evidence in the record, including the Benchmark

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[9] The fees were set when the Librarian's Decision was published in the *Federal Register* on July 8, 2002. The Librarian extended the payment date from August 20 to October 20, 2002.

[10] Although the date for making royalty payments in arrears has passed, this issue is "capable of repetition, yet evading review." *See Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972).

Agreements and the 115 Label Agreements; (2) vacate the Librarian's $500 annual minimum fee determination for eligible nonsubscription services and enter its own determination setting an annual minimum fee of $5,000; and (3) determine that the Librarian does not have the authority to delay royalty payments in arrears pursuant to 37 C.F.R. § 261.4(e).

ARGUMENT

I. THE LIBRARIAN ARBITRARILY FAILED TO CONSIDER EVIDENCE OF AGREEMENTS AS BENCHMARKS AND CORROBORATING EVIDENCE OF RATES AGREED TO BY WILLING BUYERS AND WILLING SELLERS.

Sections 114 and 112 direct the CARP to "establish the rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." The CARP "shall base its decision on economic, competitive and programming information presented by the parties" and "may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements," which may be negotiated during a six-month voluntary negotiation period that must occur before any party may file a petition for a CARP. Section 114(f)(2)(A) & (B); *see also* Section 112(e)(3) & (4) (containing similar language).

The Owners and Performers structured their cases to meet these requirements. In particular, they presented comparable marketplace agreements as benchmarks for the CARP to use in setting rates and terms. As the Librarian has said, benchmarks are "marketplace analogies" and "are the starting point for establishing an appropriate rate." A benchmark "is a marketplace point of reference, and . . . need not be perfect to be considered in a rate setting proceeding . . . ." Although some proposed benchmarks may be so different that they must be rejected, it is appropriate to adjust an analogous proposed benchmark to reflect differences

between the benchmark and the market for which the rate is being set. *See* PES Decision at 25404.

Consistent with the statutory requirement for a voluntary negotiation period, 17 U.S.C. § 114(f)(2)(A), RIAA participated in negotiations with webcasters who were eligible for the statutory license and who chose to negotiate rather than wait for the CARP to set a rate. RIAA introduced the resulting agreements as its benchmark: 26 Benchmark Agreements for comparable services in comparable circumstances, as provided in Section 114(f)(1)(B). As corroborating evidence, RIAA introduced 115 Label Agreements, negotiated by individual record labels with various licensees, that shared many characteristics of the CARP's hypothetical marketplace – negotiations in the free market for the same category of works being licensed (sound recordings), the same licensors (record companies) and many of the same licensees (webcasters).

The CARP arbitrarily dismissed the 115 Label Agreements in a single paragraph that erroneously characterized those agreements as similar to the Service's theoretical benchmark model, which the CARP properly rejected as entirely different from the marketplace under consideration. The CARP chose to use as the benchmark only one of the 26 Benchmark Agreements, the Yahoo! agreement, and gave the others only very modest weight for limited purposes. The CARP made no effort to account for or adjust the 25 non-Yahoo! Benchmark Agreements in establishing the "zone of reasonableness" within which it set performance rates. The effect of this arbitrary disregard of 25 of the 26 Benchmark Agreements, and all 115 Label Agreements, was to depress the range of the zone of reasonableness by basing it on the single agreement that had the lowest rates, without adjustment to reflect the numerous agreements that demonstrated significantly higher marketplace rates.

In reviewing the CARP's already unduly restrictive benchmark analysis and refusing to rely on the 25 non-Yahoo! agreements even to the limited extent that the CARP had done so,[11] the Librarian adopted a standard of comparability so strict that it effectively eliminates from Section 114 the provision that permits consideration of comparable licensing agreements, including those negotiated during the voluntary negotiation period. Similarly, contrary to the statutory requirement to consider economic and competitive information related to the willing buyer/willing seller marketplace, the Librarian arbitrarily dismissed the 115 Label Agreements in a brief, inaccurate footnote suggesting that all Agreements were of a single type that is in fact one small subset of those agreements. The application of these extremely restrictive evidentiary standards depressed the upper end of the zone of reasonableness below the already-low upper boundary of the zones established by the CARP. The rates adopted by the Librarian were well outside of any zone that could have been established through full consideration of the 115 Label Agreements and the 26 Benchmark Agreements.

While the CARP and the Librarian have discretion in weighing the evidence before them, that discretion is not without bounds, particularly when their actions have the effect of nullifying various provisions of the Copyright Act. This Court must send a clear message that the CARP and Librarian cannot eviscerate the rate-setting provisions of Section 112 and 114 established by Congress. The rate determination must be remanded so rates and minimum fees can be set at a level that accounts for *all* the record evidence, including the 115 Label Agreements and the 26 Benchmark Agreements.

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[11] As discussed below, the Librarian rejected the 25 non-Yahoo! Benchmark Agreements for setting rates, yet relied upon a rejected agreement to establish the $500 annual minimum fee for all Section 114 statutory licensees.

A. The Librarian Arbitrarily Accepted the CARP's Complete Rejection of 115 Label Agreements.

In a single paragraph, with no analysis or discussion, the CARP rejected the 115 Label Agreements that RIAA offered as evidence of what comparable willing buyers and willing sellers would agree to as royalty rates for comparable rights in comparable markets. Although the Owners and Performers demonstrated the error in the CARP's treatment of these agreements in their petition to modify the CARP report, Petition to Modify at 36 (J.A._____), the Librarian adopted the CARP's decision on this point in a single footnote, without substantive analysis. *See* Librarian's Decision at 45248 n.20 (J.A.____) and June 20 Restricted version at 25 n.20 (J.A.____) (contains unredacted footnote text). In rejecting this critical evidence "without explanation," the Librarian "acted in an arbitrary manner in ratifying the Panel's action." *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 923 (D.C. Cir. 1998) (internal quotations omitted).

This action is rendered more arbitrary because the Librarian appears to have misunderstood the scope and nature of the 115 Label Agreements. These agreements were by no means limited to the single type of agreement mentioned in his footnote – there are only 11 agreements of this type in the 115 Label Agreements.[12] Instead, as noted in the Petition to Modify, the Agreements involved various types of comparable streaming services on the Internet, including both nonsubscription and subscription webcasting, co-branded and promotional webcasting, music videos, audio clips, music lockers, digital jukeboxes, and concert

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[12] The Librarian appears to have misunderstood the rights granted in this limited subset of agreements. Contrary to the statement in the footnote, the agreements in the subset do not involve making works, which the Librarian could understandably view as not comparable, but streaming works of that type on the Internet – an activity directly comparable to that covered by the statutory license.

streaming. *See* Petition to Modify at 35 (J.A.____); RIAA PFOF at Exhibit A (chart of all industry licensing agreements in the record) and pp. 169 A & B (Figures 5 and 6) (J.A.____). The Librarian's mischaracterization of the 115 Label Agreements renders arbitrary his summary rejection of those Agreements, and his rate determinations should be remanded for consideration based on the true nature of the 115 Label Agreements.

The CARP's dismissal of the 115 Label Agreements in a single paragraph, CARP Report at 71 (J.A.____), is no better than the Librarian's treatment of the question, and does not provide the Librarian with a basis to ignore this significant category of evidence. The CARP opines with no further analysis that, "[f]or reasons similar to those enunciated in our critique of the Webcasters' benchmark, the Panel rejects these agreements as useful benchmarks for the Section 114 rights at issue here." The CARP goes on to say that the 115 Label Agreements involve "different rights" not subject to the statutory license. CARP Report at 71 (J.A.____). The CARP is required to provide a rational analysis setting forth "specific reasons for its determinations," *Christian Broadcasting Network v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1319 (D.C. Cir. 1983), yet the CARP failed entirely to explain its puzzling comparison between the Services' rejected musical works benchmark and the 115 Label Agreements. Its cursory treatment of a major category of evidence was improper, and acceptance of that treatment by the Librarian was arbitrary.

The CARP's own analysis of the Services' "theoretical construct" based on fees paid for over-the-air broadcasts of musical works demonstrates that the comparison with the 115 Label Agreements is thoroughly mistaken. The CARP identified a dozen differences between the Services' theoretical model and the marketplace that the CARP must replicate. CARP Report at 39-40 (J.A.____). These differences included different technologies (analog vs. digital);

different copyrights (musical works vs. sound recordings); different sellers (musical works performing rights organizations vs. record companies); and different buyers (radio stations vs. webcasters). The CARP concluded that "this theoretical construct suffers serious deficiencies." CARP Report at 40 (J.A.____).

None of these flaws applies to the 115 Label Agreements. Nor is there anything theoretical about them – the 115 Label Agreements are directly comparable to the agreements that would be reached in the hypothetical marketplace because they all involve the licensing for *digital* use of *sound recording* performance or reproduction rights by the *record companies* – the actual willing sellers in the CARP's hypothetical marketplace. They also generally involve licensees who operate relatively new *Internet* services, including many webcasters.[13] While the CARP is correct that the 115 Label Agreements are not subject to the statutory license, that is exactly the point. These Agreements provide corroboration for RIAA's benchmark analysis from rates reached in the actual marketplace, unconstrained by the statutory license.

By failing to consider the 115 Label Agreements, the Librarian arbitrarily neglected a tremendous amount of economic and competitive information that would have permitted him to make a far more informed decision on rates for use of copyrighted sound recordings. The rates in the 115 Label Agreements are significantly higher than those adopted by the Librarian based on the Yahoo! benchmark alone. Had the Librarian given proper consideration to the range of

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[13] The 115 Label Agreements demonstrate the substantial experience negotiating comparable marketplace agreements that members of the RIAA Negotiating Committee brought to negotiation of the Benchmark Agreements. Contrary to the CARP's assertion that the rates the Negotiating Committee sought had "no economic validity," CARP Report at 48 n.28 (J.A.____), the record contains extensive, uncontroverted testimony from members of the Committee demonstrating that those rates were based on years of experience negotiating licensing agreements for the use of sound recordings in new and traditional media, including webcasting. RIAA PFOF ¶¶ 117-23, 140 & 194-95 (J.A.____).

rates found in these Agreements, he would have established the "zone of reasonableness" at a higher level and set higher royalty rates.

B. The Librarian Arbitrarily Rejected the 25 Non-Yahoo! Benchmark Agreements.

The Librarian's refusal to rely on any of the 25 non-Yahoo! Benchmark Agreements to establish the rate benchmark is contrary to explicit statutory language permitting consideration of precisely these types of voluntary agreements. 17 U.S.C. §§ 112(e)(4) & 114(f)(2)(A). It is also contrary to the Librarian's past treatment of benchmarks from comparable marketplace transactions, which if found to be less than "perfect" have been adjusted, not rejected. *See* PES Decision at 25396, 25399 (J.A.____); *see also Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1157 (7th Cir. 1982) ("[t]he Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences").

Affirmance of the Librarian's refusal to consider these Benchmark Agreements would set such a high bar for comparability, and would make the requirements for a valid benchmark so narrow and arduous, that the provisions cited above would effectively be written out of the statute. The Agreements were rejected for various reasons that were typical of the webcasting industry as a whole, and the webcasters who participated in the proceeding in particular.[14] Librarian's Decision at 45248-49 (J.A.____).

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[14] By a variety of measures the licensees in the 26 Benchmark Agreements looked very much like the group of webcasters who litigated in the proceeding. Both groups had members who went out of business; incurred relatively small amounts of royalty obligations; were adjuncts to larger businesses that did more than webcasting; wanted certainty over rates and terms; and wanted favorable publicity from a relationship with record companies. RIAA PFOF at ¶¶ 268-309 (J.A.____). Rejecting agreements for these reasons discards a large majority of the webcasting industry as irrelevant, will make copyright owners hesitate before negotiating with a company that might fail for fear of having the negotiated rates discredited or used against them,

(footnote continued on next page)

The Librarian went beyond even the CARP in limiting the types of agreements that could be used as benchmarks, acting arbitrarily in at least three separate ways. First, the Librarian ignored the CARP's decision about how much weight to give to these Benchmark Agreements in setting performance royalty rates. Librarian's Decision at 45255 (rejecting dual rate structure adopted by CARP and setting unitary rate with no use or mention of the 25 non-Yahoo! Benchmark Agreements) (J.A.____). The CARP determined that the 25 non-Yahoo! Benchmark Agreements should be given "very little weight" in determining the rate that would be negotiated by a willing buyer and willing seller.[15] CARP Report at 47-60 (J.A.____). This "minimal weight" was given effect in the selection of .083 cents, rather than a lower rate, as the lower boundary of the range of the rates the CARP established for Internet-only webcasters. CARP Report at 77 (J.A.____). Although the CARP articulated a rationale for its award, CARP Report at 75-78, the Librarian ignored that rationale and arbitrarily failed to accord even the minimal weight given by the CARP to the higher rates in the 25 non-Yahoo! Benchmark Agreements. As a result, the Librarian established the "zone of reasonableness" for all Services at far too low a level and selected a rate at far too low a midpoint. Appropriate consideration of these Agreements, which generally had rates in the range of 0.4 cents per performance, would have

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(footnote continued from previous page)

and places undue emphasis on the facts that happen to exist at the time a proceeding takes place, despite rapid changes in a fluid, emerging industry. Petition to Modify at 33-34 (J.A.____).

[15] The Owners and Performers do not agree with the minimal weight the CARP gave to the 25 non-Yahoo! Benchmark Agreements or to the bifurcated rate structure that it adopted. As stated in their Petition to Modify (J.A.____), the Owners and Performers believe that all of those agreements, negotiated pursuant to an express congressional directive, deserve more weight and support a significantly higher royalty rate for all Section 114 statutory licensees and all types of transmissions. But the level of consideration the CARP gave to those agreements stands in marked contrast to the Librarian's failure to consider them.

resulted in a unitary rate that was at least at the level of the rate the CARP adopted for Internet-only webcasters.

Second, the Librarian mistakenly charged the CARP with a lack of "clear explanation," and rejected as arbitrary the CARP's decision to use the higher ephemeral rates found in eight of the 25 non-Yahoo! Benchmark Agreements to establish an ephemeral rate of 9 percent. In fact, the CARP's detailed explanation of its process for reaching the ephemeral rate was arbitrarily ignored by the Librarian, who reduced the rate from 9 percent to 8.8 percent, the effective ephemeral rate from the Yahoo! agreement. Librarian's Decision at 45262 (J.A.____).

The CARP used the Yahoo! ephemeral rate of 8.8 percent and the rate of 10 percent from the other Benchmark Agreements to establish a "range" for the "rate most representative of that negotiated between willing buyers and willing sellers." It relied principally on the Yahoo! ephemeral rate, but gave "modest effect" to eight other Benchmark Agreements to round the 8.8 percent Yahoo! rate up to 9 percent. CARP Report at 104 (J.A.____). Establishing such a range or "zone of reasonableness" is consistent with this Court's past decisions. *See, e.g., NAB v. Librarian*, 146 F.3d at 932-33 (affirming CARP rate set within "zone of reasonableness"); *see also National Cable Television Ass'n. v. Copyright Royalty Tribunal*, 724 F.2d 176, 187 (D.C. Cir. 1983) (using APA standard of review to affirm CRT decision selecting rate in "zone of reasonableness.").

Third, the Librarian's application of rounding was arbitrary. The Librarian rejected the CARP's rounding of the ephemeral rate, Librarian's Decision at 45262 (J.A.____), reducing the ephemeral rate from 9 percent to 8.8 percent. At the same time, he rounded .074 to the nearest hundredth to adopt a rate of .07 at the midpoint of the "zone of reasonableness" for the performance of sound recordings. Librarian's Decision at 45255 (J.A.____). This "rounding"

resulted in a reduction in the royalty rate paid to copyright owners and performers of more than 5 percent. The result of the decision on whether or not to round each rate is consistent only in setting the lower royalty rate for the Owners and Performers in each case.

Conclusion:

While the Librarian was correct to use the Yahoo! rates as benchmarks, the arbitrary manner in which he treated the remaining 25 Benchmark Agreements and the 115 Label Agreements was reversible error. As a result of ignoring the extensive, additional, relevant record evidence of voluntary agreements, the Librarian adopted the artificially low rate of .07 cents per performance for transmission of copyrighted sound recordings. Librarian's Decision at 45255 (J.A._____).

The Librarian's arbitrary decision to rely on this narrow benchmark must be vacated and remanded with instructions to consider 1) all the record evidence related to the Benchmark Agreements in establishing a benchmark and 2) all the corroborating evidence from the 115 Label Agreements negotiated in comparable marketplaces between willing buyers and willing sellers.

II. THE LIBRARIAN ARBITRARILY UPHELD A $500 MINIMUM FEE CONTRARY TO THE RECORD EVIDENCE.

The CARP is required to set a minimum fee for each type of eligible nonsubscription service. 17 U.S.C. § 114(f)(2)(B). The Librarian arbitrarily upheld the CARP's decision to set the annual minimum fee for all eligible nonsubscription services at $500, despite extensive record support for an annual minimum fee of $5,000. As set forth more fully in the Petition to Modify of Owners and Performers at 43-45 (J.A._____) and RIAA PFOF at ¶¶ 230-234 (J.A._____), the most typical minimum fee in the Benchmark Agreements was $5,000. With the

exception of one $500 fee for a small webcaster in unique circumstances, the annual minimum fees ranged from $5,000 to several hundred thousand dollars. *See* RIAA PFOF App. A at 16-22 (listing minimum fees). The minimum fee should have been set within the range established by the evidence, or based on the fee in the Yahoo! agreement. Instead, the Librarian never addressed the evidence supporting a $5,000 minimum fee or the CARP's failure to consider the entire range of fees. He simply accepted the CARP's reliance on a single non-Yahoo! agreement for the $500 annual minimum, although he concluded that it was arbitrary for the CARP to rely on the non-Yahoo! Benchmark Agreements to set performance rates. Librarian's Decision at 45262-63 (J.A.____).

Setting the fee at the lowest of the minimum fees negotiated by RIAA, when the evidence demonstrates that the data point used to set the low fee is an outlier, is contrary to congressional policy encouraging voluntary agreements. Copyright owners and performers will be extremely reluctant to take the individual circumstances of a particular webcaster into account if any resulting low rate will be used to set fees or rates for the entire industry.

In accordance with the record evidence and the statutory authority of the Court, this Court should modify the decision of the Librarian and enter its own determination setting the annual minimum fee for eligible nonsubscription services at $5,000. *See* 17 U.S.C. § 802(g).

III. THE LIBRARIAN IMPROPERLY ADOPTED A TERM CHANGING THE SCHEDULE FOR PAYMENTS IN ARREARS.

Sections 112(e)(4) and 114(f)(2)(B) provide that the CARP shall determine reasonable terms to administer the statutory licenses for the performance and ephemeral reproduction of copyrighted sound recordings. The Librarian arbitrarily adopted a term that delayed the payment date for royalty payments in arrears. The term states that "[a] licensee shall make any payments

due under § 261.3 [which sets forth royalty fees] for transmissions made between October 28, 1998 and August 31, 2002, to the Receiving Agent by October 20, 2002." 37 C.F.R. § 261.4(e), Librarian's Decision at 45274 (J.A.____). This provision, which was not considered or adopted by the CARP (J.A.____), contradicts a specific requirement in Section 114 and has no support in record evidence.

A. The Term Established by the Librarian Is in Direct Conflict with the Payment Date Specified in the Copyright Act.

Section 114(f)(4)(C) states that "[a]ny royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set." In this case, the royalty fees were set when the Librarian's decision was published in the Federal Register on July 8, 2002. *See* 17 U.S.C. § 802(f) ("If the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of an additional 30-day period . . . issue an order *setting* the royalty fee.") (emphasis added).

Based on the explicit language of the statute, payment for all transmissions made between October 28, 1998 and July 8, 2002 – the date the rates were set – was due on or before August 20, 2002. Instead, the Librarian arbitrarily ignored this express statutory provision and delayed the deadline for payments of amounts in arrears to October 20, 2002.[16] The Owners and

[16] The Owners and Performers recognize that the date for making these payments in arrears has passed. They nevertheless seek a ruling on this issue, which clearly is "capable of repetition, yet evading review." *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2, 92 S. Ct. 995, 998 n.2 (1972). *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 400 (1975) (review permitted where no challenger will remain subject to statutory restrictions for the period necessary to conclude lawsuit); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (review available when duration of challenged action too short to be fully litigated by complaining party that could be subject to action again). Indeed, royalty payments in arrears may be due for 2003-04, because certain statutory licensees take the position that rates are not yet in place. When rates are set, the Librarian might choose once again to delay the payment deadline.

Performers, who had been waiting to receive payment since 1998 and receive no interest on delayed payments, were forced to wait yet again.

The Librarian appears to believe that he may delay the payment date established in Section 114 by setting a later effective date for his decision pursuant to Section 802(g) of the Copyright Act. However, Congress has established an explicit timetable for the provision on royalty payments in arrears to take effect, and the Librarian may not set an effective date that conflicts with this specific statutory provision. Even if the Register is correct in her view that the Librarian generally has discretion to set effective dates – and that is far from clear[17] – the more specific statutory provision setting the timetable for payments in arrears must take precedence when it applies, so that the Librarian can only set effective dates that are consistent with specific statutory payment dates. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general").

This postponement of the due date for payments in arrears "plainly contravene[s] applicable statutory provisions." *Recording Indus. Ass'n of Am. v. Librarian of Congress*, 176 F.3d 528, 535 (D.C. Cir. 1999) ("*RIAA v. Librarian*"). This Court should direct the Librarian not to repeat this arbitrary action.

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[17] The Owners and Performers believe that the Register is mistaken in her interpretation of Section 802(g), which provides that if no one appeals the Librarian's decision to this Court within 30 days after publication in the Federal Register, the royalty fee "shall take effect as set forth in the decision." This provision has nothing to do with setting an effective date, but follows from the statement in Section 802(f) that if the determination of the CARP is not adopted, the Librarian shall "issue an order setting the royalty fee" and cause "the decision of the Librarian (including [such] an order . . .)" to be published in the Federal Register. Thus, the better reading of 802(g) in the context of 802(f) is that fees *as set forth in the Librarian's decision* shall be definitely established, and cannot be changed, upon the expiration of a thirty-day period if no party petitions this Court for review.

B. The Delayed Payment Date for Past Due Royalties Has No Basis in the Evidentiary Record.

The Librarian's decision must "bear[] a rational relationship to the record evidence." *NAB v. Librarian*, 146 F.3d at 924. Yet in this instance, the Librarian extended the due date for payments in arrears by two months, despite the fact that the record was devoid of *any* evidence on the subject.[18] The Librarian cites no record evidence to support his ruling on royalty payments in arrears. Librarian's Decision at 45271 (J.A._____).

Adopting a term without record support, no matter what type of explanation is offered, ignores this Court's admonition to the Librarian in *RIAA v. Librarian*, 176 F.3d at 535, that "[i]t is not enough for the Librarian simply to offer a plausible explanation for his actions; there must be record evidence to support the terms imposed." In that case, this Court found arbitrary the imposition of terms on RIAA that had not been considered by the CARP and were not supported by record evidence. *Id.* at 536. Yet despite that warning, the Librarian has once again proposed a term unsupported by record evidence.

Given this Court's clear instruction to the Librarian that terms cannot be adopted without consideration by the CARP, the Register's attempts to explain adoption of this term are unavailing. In any event, that explanation – that the Librarian has delayed the effective date for past decisions – is flawed because it confuses the issues of the establishment of an effective date

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[18] The only mention during the proceeding of a possible term for royalty payments in arrears was made before the 180-day arbitration period, when the Owners and Performers moved to strike a provision changing the schedule for royalty payments in arrears from the proposed terms of the Webcasters and Broadcasters. Motion to Strike Provisions From Rate Request of Broadcasters and Webcasters in Docket No. 2000-9 CARP DTRA 1 & 2 (May 25, 2001) (J.A.____.) The Office granted the motion to strike, reiterating that "the statute requires payment of arrears to take place by the twentieth day of the month following the month in which the royalty fees are set." Order in Docket No. 2000-9 CARP DTRA 1 & 2 (June 25, 2001) (J.A.____.) It is inexplicable that the Register subsequently advised the Librarian to establish a term that conflicts with the same statutory provision.

for the rates and the issue of payment of royalty fees in arrears. After an initial citation to the Section 114 provision for payments in arrears, the Register's entire discussion leading to the postponement of the payment date involves a description of the Librarian's asserted ability to set an effective date for royalty payments pursuant to 17 U.S.C. § 802(g), an entirely different statutory provision. Librarian's Decision at 45271 (J.A.____). As noted above, any such imputed authority gives way before the specific statutory provision setting a deadline for the royalty payments in arrears.

The Register's explanation has a flaw that goes to fundamental fairness. It considers "the impact of the rate on the Licensees and the administrative burden on the Office,"[19] Librarian's Decision at 45271 (J.A.____), but fails to consider the impact of the provision on copyright owners and performers. In giving the Licensees "additional time to make the initial payment and any necessary adjustments in their business operations to meet their copyright obligation," the Register and Librarian failed to consider that the Licensees had been on notice of their obligations since 1998 – almost *four years* before the Librarian's Decision was published – and had been able to build their businesses by performing copyrighted sound recordings without paying a cent in royalties. Copyright owners and performers have in effect provided Licensees with an interest-free loan for years, and in many cases never received payment from entities that went out of business. Yet the Librarian failed to acknowledge their pressing need to obtain payment in order to support their creative efforts to make more music available to the public.

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[19] Beyond the stated need for time to develop and issue notice and recordkeeping regulations before the effective date, Librarian's Decision at 45271 (J.A.____), the nature of this burden on the Office is unclear. And the delay in the deadline for payment of royalties in arrears was unavailing in allowing the Office to issue regulations; in fact, the Office has not yet issued those regulations even though the notice and recordkeeping proceeding started on February 7, 2002.

The Register's analysis justifying a delay of payments in arrears fails to rise to the level of a "plausible explanation," although as this Court has said, even that would not be enough to justify the adoption of this term in the absence of any record evidence or opportunity for the parties to offer their views. *RIAA v. Librarian*, 176 F.3d at 535.

This Court should order the Librarian not to adopt terms that delay royalty payments in arrears beyond the period specified in Section 114.

CONCLUSION

The Owners and Performers ask this Court to (1) vacate the Librarian's Decision insofar as it establishes royalty rates for eligible nonsubscription services, and remand that rate determination with instructions to give full consideration to the evidence in the record, including the Benchmark Agreements and the 115 Label Agreements; (2) vacate the Librarian's $500 annual minimum fee determination for eligible nonsubscription services and enter its own determination setting an annual minimum fee of $5,000; and (3) issue a determination that the Librarian does not have the authority to delay royalty payments in arrears pursuant to 37 C.F.R. § 261.4(e).

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July 8, 2003

STATUTORY ADDENDUM

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which it is authorized to carry, the values for independent, network, and noncommercial educational stations set forth above, as the case may be, shall be multiplied by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station.

A "network station" is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day.

An "independent station" is a commercial television broadcast station other than a network station.

A "noncommercial educational station" is a television station that is a noncommercial educational broadcast station as defined in section 397 of title 47.

§ 112 · Limitations on exclusive rights: Ephemeral recordings[44]

(a)(1) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license, including a statutory license under section 114(f), or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114 (a) or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis, to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(B) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright

owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord as permitted under that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord, for each transmitting organization specified in clause (2) of this subsection, of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work, if—

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance of a work under section 110(8) to make no more than ten copies or phonorecords embodying the performance, or to permit the use of any such copy or phonorecord by any governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), if—

(1) any such copy or phonorecord is retained and used solely by the organization that made it, or by a governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), and no further copies or phonorecords are reproduced from it; and

(2) any such copy or phonorecord is used solely for transmissions authorized under section 110(8), or for purposes of archival preservation or security; and

(3) the governmental body or nonprofit organization permitting any use of any such copy or phonorecord by any governmental body or nonprofit organization under this subsection does not make any charge for such use.

(e) STATUTORY LICENSE.—(1) A transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f) is entitled to a statutory license, under the conditions specified by this subsection, to make no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more), if the following conditions are satisfied:

(A) The phonorecord is retained and used solely by the transmitting organization that made it, and no further phonorecords are reproduced from it.

(B) The phonorecord is used solely for the transmitting organization's own transmissions originating in the United States under a statutory license in accordance with section 114(f) or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).

(C) Unless preserved exclusively for purposes of archival preservation, the phonorecord is destroyed within 6 months from the date the sound recording was first transmitted to the public using the phonorecord.

(D) Phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the phonorecord under this subsection from a phonorecord lawfully made and acquired under the authority of the copyright owner.

(2) Notwithstanding any provision of the antitrust laws, any copyright owners of sound recordings and any transmitting organizations entitled to a statutory license under this subsection may negotiate and agree upon royalty rates and license terms and conditions for making phonorecords of such sound recordings under this section and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(3) No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation

proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by paragraph (1) of this subsection during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. Any copyright owners of sound recordings or any transmitting organizations entitled to a statutory license under this subsection may submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(4) In the absence of license agreements negotiated under paragraph (2), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (3), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (5), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The copyright arbitration royalty panel shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive, and programming information presented by the parties, including—

(A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and

(B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms under voluntary license agreements negotiated as provided in paragraphs (2) and (3). The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.

(5) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more transmitting organizations entitled to obtain a statutory license under this subsection shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

(6) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in paragraph (3) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (3). The procedures specified in paragraph (4) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1), during a 60-day period commencing on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (3). The procedures specified in paragraph (4) shall be concluded in accordance with section 802.

(7)(A) Any person who wishes to make a phonorecord of a sound recording under a statutory license in accordance with this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording under section 106(1)—

(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

(B) Any royalty payments in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set.

(8) If a transmitting organization entitled to make a phonorecord under this subsection is prevented from making such phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the sound recording, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such phonorecord as permitted under this subsection, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such phonorecords as permitted under this subsection.

(9) Nothing in this subsection annuls, limits, impairs, or otherwise affects in any way the existence or value of any of the exclusive rights of the copyright owners in a sound recording, except as otherwise provided in this subsection, or in a musical work, including the exclusive rights to reproduce and distribute a sound recording or musical work, including by means of a digital phonorecord delivery, under section 106(1), 106(3), and 115, and the right to perform publicly a sound recording or musical work, including by means of a digital audio transmission, under sections 106(4) and 106(6).

(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if—

(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if—

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

(g) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the preexisting works employed in the program.

§ 113 · Scope of exclusive rights in pictorial, graphic, and sculptural works[45]

(a) Subject to the provisions of subsections (b) and (c) of this section, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

(b) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making,

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author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

§ 114 · Scope of exclusive rights in sound recordings[46]

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

(d) LIMITATIONS ON EXCLUSIVE RIGHT.—Notwithstanding the provisions of section 106(6)—

(1) EXEMPT TRANSMISSIONS AND RETRANSMISSIONS.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

(A) a nonsubscription broadcast transmission;

(B) a retransmission of a nonsubscription broadcast transmission: *Provided*, That, in the case of a retransmission of a radio station's broadcast transmission—

(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter, however—

(I) the 150 mile limitation under this clause shall not apply when a nonsubscription broadcast transmission by a radio station licensed by the Federal Communications Commission is retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission; and

(II) in the case of a subscription retransmission of a nonsubscription broadcast retransmission covered by subclause (I), the 150 mile radius shall be measured from the transmitter site of such broadcast retransmitter;

(ii) the retransmission is of radio station broadcast transmissions that are—

(I) obtained by the retransmitter over the air;

(II) not electronically processed by the retransmitter to deliver separate and discrete signals; and

(III) retransmitted only within the local communities served by the retransmitter;

(iii) the radio station's broadcast transmission was being retransmitted to cable systems (as defined in section 111(f)) by a satellite carrier on January 1, 1995, and that retransmission was being retransmitted by cable systems as a separate and discrete signal, and the satellite carrier obtains the radio station's broadcast transmission in an analog format: *Provided*, That the broadcast transmission being retransmitted may embody the programming of no more than one radio station; or

(iv) the radio station's broadcast transmission is made by a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)), consists solely of noncommercial educational and cultural radio programs, and the retransmission, whether or not simultaneous, is a nonsubscription terrestrial broadcast retransmission; or

(C) a transmission that comes within any of the following categories—

(i) a prior or simultaneous transmission incidental to an exempt transmission, such as a feed received by and then retransmitted by an exempt transmitter: *Provided*, That such incidental transmissions do not include any subscription transmission directly for reception by members of the public;

(ii) a transmission within a business establishment, confined to its premises or the immediately surrounding vicinity;

(iii) a retransmission by any retransmitter, including a multichannel video programming distributor as defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522 (12)), of a transmission by

a transmitter licensed to publicly perform the sound recording as a part of that transmission, if the retransmission is simultaneous with the licensed transmission and authorized by the transmitter; or

(iv) a transmission to a business establishment for use in the ordinary course of its business: *Provided*, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement. Nothing in this clause shall limit the scope of the exemption in clause (ii).

(2) STATUTORY LICENSING OF CERTAIN TRANSMISSIONS.—

The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if—

(A)(i) the transmission is not part of an interactive service;

(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and

(iii) except as provided in section 1002(e), the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer;

(B) in the case of a subscription transmission not exempt under paragraph (1) that is made by a preexisting subscription service in the same transmission medium used by such service on July 31, 1998, or in the case of a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service—

(i) the transmission does not exceed the sound recording performance complement; and

(ii) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted; and

(C) in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998—

(i) the transmission does not exceed the sound recording performance complement, except that this requirement shall not apply in the case of a retransmission of a broadcast transmission if the retransmission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission, unless—

(I) the broadcast station makes broadcast transmissions—

(aa) in digital format that regularly exceed the sound recording performance complement; or

(bb) in analog format, a substantial portion of which, on a weekly basis, exceed the sound recording performance complement; and

(II) the sound recording copyright owner or its representative has notified the transmitting entity in writing that broadcast transmissions of the copyright owner's sound recordings exceed the sound recording performance complement as provided in this clause;

(ii) the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period, and in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, the requirement of this clause shall not apply to a prior oral announcement by the broadcast station, or to an advance program schedule published, induced, or facilitated by the broadcast station, if the transmitting entity does not have actual knowledge and has not received written notice from the copyright owner or its representative that the broadcast station publishes or induces or facilitates the publication of such advance program schedule, or if such advance program schedule is a schedule of classical music programming published by the broadcast station in the same manner as published by that broadcast station on or before September 30, 1998;

(iii) the transmission—

(I) is not part of an archived program of less than 5 hours duration;

(II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks;

(III) is not part of a continuous program which is of less than 3 hours duration; or

(IV) is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at—

(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or

(bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of 1 hour or more in duration, except that the requirement of this subclause shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(iv) the transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;

(v) the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998;

(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting

entity sets such technology to limit such making of phonorecords to the extent permitted by such technology;

(vii) phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner, except that the requirement of this clause shall not apply to a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

(viii) the transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners; and

(ix) the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity, except that the obligation in this clause shall not take effect until 1 year after the date of the enactment of the Digital Millennium Copyright Act and shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, or in the case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace.

(3) LICENSES FOR TRANSMISSIONS BY INTERACTIVE SERVICES.—

(A) No interactive service shall be granted an exclusive license under section 106(6) for the performance of a sound recording publicly by means of digital audio transmission for a period in excess of 12 months, except that with respect to an exclusive license granted to an interactive service by a licensor that holds the copyright to 1,000 or fewer sound recordings, the period of such license shall not exceed 24 months: *Provided, however*, That the grantee of such exclusive license shall be ineligible to receive another exclusive license for the performance of that sound recording for a period of 13 months from the expiration of the prior exclusive license.

(B) The limitation set forth in subparagraph (A) of this paragraph shall not apply if—

(i) the licensor has granted and there remain in effect licenses under section 106(6) for the public performance of sound recordings by means of digital audio transmission by at least 5 different interactive services; *Provided, however*, That each such license must be for a minimum of 10 percent of the copyrighted sound recordings owned by the licensor that have been licensed to interactive services, but in no event less than 50 sound recordings; or

(ii) the exclusive license is granted to perform publicly up to 45 seconds of a sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(C) Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: *Provided*, That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.

(D) The performance of a sound recording by means of a retransmission of a digital audio transmission is not an infringement of section 106(6) if—

(i) the retransmission is of a transmission by an interactive service licensed to publicly perform the sound recording to a particular member of the public as part of that transmission; and

(ii) the retransmission is simultaneous with the licensed transmission, authorized by the transmitter, and limited to that particular member of the public intended by the interactive service to be the recipient of the transmission.

(E) For the purposes of this paragraph—

(i) a "licensor" shall include the licensing entity and any other entity under any material degree of common ownership, management, or control that owns copyrights in sound recordings; and

(ii) a "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owner, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

(4) RIGHTS NOT OTHERWISE LIMITED.—

(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital audio transmission under section 106(6).

(B) Nothing in this section annuls or limits in any way—

(i) the exclusive right to publicly perform a musical work, including by means of a digital audio transmission, under section 106(4);

(ii) the exclusive rights in a sound recording or the musical work embodied therein under sections 106(1), 106(2) and 106(3); or

(iii) any other rights under any other clause of section 106, or remedies available under this title as such rights or remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(C) Any limitations in this section on the exclusive right under section 106(6) apply only to the exclusive right under section 106(6) and not to any other exclusive rights under section 106. Nothing in this section shall be construed to annul, limit, impair or otherwise affect in any way the ability of the owner of a copyright in a sound recording to exercise the rights under sections 106(1), 106(2) and 106(3), or to obtain the remedies available under this title pursuant to such rights, as such rights and remedies exist either before or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(e) AUTHORITY FOR NEGOTIATIONS.—

(1) Notwithstanding any provision of the antitrust laws, in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments.

(2) For licenses granted under section 106(6), other than statutory licenses, such as for performances by interactive services or performances that exceed the sound recording performance complement—

(A) copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments: *Provided*, That each copyright owner shall establish the royalty rates and material license terms and conditions

unilaterally, that is, not in agreement, combination, or concert with other copyright owners of sound recordings; and

(B) entities performing sound recordings affected by this section may designate common agents to act on their behalf to obtain licenses and collect and pay royalty fees: *Provided*, That each entity performing sound recordings shall determine the royalty rates and material license terms and conditions unilaterally, that is, not in agreement, combination, or concert with other entities performing sound recordings.

(f) LICENSES FOR CERTAIN NONEXEMPT TRANSMISSIONS.[47]

(1)(A)[48] No later than 30 days after the enactment of the Digital Performance Right in Sound Recordings Act of 1995, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services specified by subsection (d)(2) of this section during the period beginning on the effective date of such Act and ending on December 31, 2001, or, if a copyright arbitration royalty panel is convened, ending 30 days after the Librarian issues and publishes in the Federal Register an order adopting the determination of the copyright arbitration royalty panel or an order setting the terms and rates (if the Librarian rejects the panel's determination). Such terms and rates shall distinguish among the different types of digital audio transmission services then in operation. Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Librarian of Congress licenses covering such subscription transmissions with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(B) In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph. In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the copyright arbitration royalty panel may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in subparagraph (A).

(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe—

(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational; and

(II) in the first week of January 2001, and at 5-year intervals thereafter.

(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I) of this subparagraph; or

(II) on July 1, 2001, and at 5-year intervals thereafter.

(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802.

(2)(A) No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services specified by subsection (d)(2) during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation and shall include a minimum fee for each such type of service. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Librarian of Congress licenses covering such eligible nonsubscription transmissions and new subscription services with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

(B) In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel

to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including—

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).

(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated in accordance with regulations that the Librarian of Congress shall prescribe—

(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational; and

(II) in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I); or

(II) on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802.

(3) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

(4)(A) The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.

(B) Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

(C) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.

(5)(A) Notwithstanding section 112(e) and the other provisions of this subsection, the receiving agent may enter into agreements for the reproduction and performance of sound recordings under section 112(e) and this section by any 1 or more small commercial webcasters or noncommercial webcasters during the period beginning on October 28, 1998, and ending on December 31, 2004, that, once published in the Federal Register pursuant to subparagraph (B), shall be binding on all copyright owners of sound recordings and other persons entitled to payment under this section, in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress. Any such agreement for small commercial

webcasters shall include provisions for payment of royalties on the basis of a percentage of revenue or expenses, or both, and include a minimum fee. Any such agreement may include other terms and conditions, including requirements by which copyright owners may receive notice of the use of their sound recordings and under which records of such use shall be kept and made available by small commercial webcasters or noncommercial webcasters. The receiving agent shall be under no obligation to negotiate any such agreement. The receiving agent shall have no obligation to any copyright owner of sound recordings or any other person entitled to payment under this section in negotiating any such agreement, and no liability to any copyright owner of sound recordings or any other person entitled to payment under this section for having entered into such agreement.

(B) The Copyright Office shall cause to be published in the Federal Register any agreement entered into pursuant to subparagraph (A). Such publication shall include a statement containing the substance of subparagraph (C). Such agreements shall not be included in the Code of Federal Regulations. Thereafter, the terms of such agreement shall be available, as an option, to any small commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement.

(C) Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Librarian of Congress under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).

(D) Nothing in the Small Webcaster Settlement Act of 2002 or any agreement entered into pursuant to subparagraph (A) shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of the determination by the Librarian of Congress of July 8, 2002, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to sections 112 and 114.

(E) As used in this paragraph—

(i) the term "noncommercial webcaster" means a webcaster that—

(I) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or

(III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes;

(ii) the term "receiving agent" shall have the meaning given that term in section 261.2 of title 37, Code of Federal Regulations, as published in the Federal Register on July 8, 2002; and

(iii) the term "webcaster" means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefor to make eligible nonsubscription transmissions and ephemeral recordings.

(F) The authority to make settlements pursuant to subparagraph (A) shall expire December 15, 2002, except with respect to noncommercial webcasters for whom the authority shall expire May 31, 2003.

(g) PROCEEDS FROM LICENSING OF TRANSMISSIONS.—

(1) Except in the case of a transmission licensed under a statutory license in accordance with subsection (f) of this section—

(A) a featured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract; and

(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

(2) An agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall distribute such receipts as follows:

(A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission.

(B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or

any successor entity) to be distributed to nonfeatured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.

(C) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

(D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

(3) A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto other than copyright owners and performers who have elected to receive royalties from another designated agent and have notified such nonprofit agent in writing of such election, the reasonable costs of such agent incurred after November 1, 1995, in—

(A) the administration of the collection, distribution, and calculation of the royalties;

(B) the settlement of disputes relating to the collection and calculation of the royalties; and

(C) the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to licensing under section 112 and this section, including those incurred in participating in negotiations or arbitration proceedings under section 112 and this section, except that all costs incurred relating to the section 112 ephemeral recordings right may only be deducted from the royalties received pursuant to section 112.

(4) Notwithstanding paragraph (3), any designated agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts, the reasonable costs identified in paragraph (3) of such agent incurred after November 1, 1995, with respect to such copyright owners and performers who have entered with such agent a contractual relationship that specifies that such costs may be deducted from such royalty receipts.

(h) LICENSING TO AFFILIATES.—

(1) If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under section 106(6), the copyright owner shall make the licensed sound recording available under section 106(6) on no less favorable terms and

conditions to all bona fide entities that offer similar services, except that, if there are material differences in the scope of the requested license with respect to the type of service, the particular sound recordings licensed, the frequency of use, the number of subscribers served, or the duration, then the copyright owner may establish different terms and conditions for such other services.

(2) The limitation set forth in paragraph (1) of this subsection shall not apply in the case where the copyright owner of a sound recording licenses—

(A) an interactive service; or

(B) an entity to perform publicly up to 45 seconds of the sound recording and the sole purpose of the performance is to promote the distribution or performance of that sound recording.

(i) NO EFFECT ON ROYALTIES FOR UNDERLYING WORKS.—License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).

(j) DEFINITIONS.—As used in this section, the following terms have the following meanings:

(1) An "affiliated entity" is an entity engaging in digital audio transmissions covered by section 106(6), other than an interactive service, in which the licensor has any direct or indirect partnership or any ownership interest amounting to 5 percent or more of the outstanding voting or nonvoting stock.

(2) An "archived program" is a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording.

(3) A "broadcast" transmission is a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission.

(4) A "continuous program" is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.

(5) A "digital audio transmission" is a digital transmission as defined in section 101, that embodies the transmission of a sound recording. This term does not include the transmission of any audiovisual work.

(6) An "eligible nonsubscription transmission" is a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1)

that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(7) An "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

(8) A "new subscription service" is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(9) A "nonsubscription" transmission is any transmission that is not a subscription transmission.

(10) A "preexisting satellite digital audio radio service" is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(11) A "preexisting subscription service" is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(12) A "retransmission" is a further transmission of an initial transmission, and includes any further retransmission of the same transmission. Except as

provided in this section, a transmission qualifies as a "retransmission" only if it is simultaneous with the initial transmission. Nothing in this definition shall be construed to exempt a transmission that fails to satisfy a separate element required to qualify for an exemption under section 114(d)(1).

(13) The "sound recording performance complement" is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—

(i) by the same featured recording artist; or

(ii) from any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States,

if no more than three such selections are transmitted consecutively:

Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

(14) A "subscription" transmission is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.

(15) A "transmission" is either an initial transmission or a retransmission.

§ 115 · Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords[49]

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain

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(1) authorizing the distribution of those royalty fees collected under sections 111, 119, and 1005 that the Librarian has found are not subject to controversy; and

(2) accepting or rejecting royalty claims filed under sections 111, 119, and 1007 on the basis of timeliness or the failure to establish the basis for a claim.

(d) SUPPORT AND REIMBURSEMENT OF ARBITRATION PANELS. — The Librarian of Congress, upon the recommendation of the Register of Copyrights, shall provide the copyright arbitration royalty panels with the necessary administrative services related to proceedings under this chapter, and shall reimburse the arbitrators presiding in distribution proceedings at such intervals and in such manner as the Librarian shall provide by regulation. Each such arbitrator is an independent contractor acting on behalf of the United States, and shall be hired pursuant to a signed agreement between the Library of Congress and the arbitrator. Payments to the arbitrators shall be considered reasonable costs incurred by the Library of Congress and the Copyright Office for purposes of section 802(h)(1).

§ 802 · Membership and proceedings of copyright arbitration royalty panels[3]

(a) COMPOSITION OF COPYRIGHT ARBITRATION ROYALTY PANELS. — A copyright arbitration royalty panel shall consist of 3 arbitrators selected by the Librarian of Congress pursuant to subsection (b).

(b) SELECTION OF ARBITRATION PANEL. — Not later than 10 days after publication of a notice in the Federal Register initiating an arbitration proceeding under section 803, and in accordance with procedures specified by the Register of Copyrights, the Librarian of Congress shall, upon the recommendation of the Register of Copyrights, select 2 arbitrators from lists provided by professional arbitration associations. Qualifications of the arbitrators shall include experience in conducting arbitration proceedings and facilitating the resolution and settlement of disputes, and any qualifications which the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt by regulation. The 2 arbitrators so selected shall, within 10 days after their selection, choose a third arbitrator from the same lists, who shall serve as the chairperson of the arbitrators. If such 2 arbitrators fail to agree upon the selection of a third arbitrator, the Librarian of Congress shall promptly select the third arbitrator. The Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt regulations regarding standards of conduct which shall govern arbitrators and the proceedings under this chapter.[4]

(c) ARBITRATION PROCEEDINGS. — Copyright arbitration royalty panels shall conduct arbitration proceedings, subject to subchapter II of chapter 5 of title 5, for the purpose of making their determinations in carrying out the purposes set forth

in section 801. The arbitration panels shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c). Any copyright owner who claims to be entitled to royalties under section 111, 112, 114, 116, or 119, any transmitting organization entitled to a statutory license under section 112(g), any person entitled to a statutory license under section 114(d), any person entitled to a compulsory license under section 115, or any interested copyright party who claims to be entitled to royalties under section 1006, may submit relevant information and proposals to the arbitration panels in proceedings applicable to such copyright owner or interested copyright party, and any other person participating in arbitration proceedings may submit such relevant information and proposals to the arbitration panel conducting the proceedings. In ratemaking proceedings, the parties to the proceedings shall bear the entire cost thereof in such manner and proportion as the arbitration panels shall direct. In distribution proceedings, the parties shall bear the cost in direct proportion to their share of the distribution.

(d) PROCEDURES.—Effective on the date of the enactment of the Copyright Royalty Tribunal Reform Act of 1993, the Librarian of Congress shall adopt the rules and regulations set forth in chapter 3 of title 37 of the Code of Federal Regulations to govern proceedings under this chapter. Such rules and regulations shall remain in effect unless and until the Librarian, upon the recommendation of the Register of Copyrights, adopts supplemental or superseding regulations under subchapter II of chapter 5 of title 5.

(e) REPORT TO THE LIBRARIAN OF CONGRESS.—Not later than 180 days after publication of the notice in the Federal Register initiating an arbitration proceeding, the copyright arbitration royalty panel conducting the proceeding shall report to the Librarian of Congress its determination concerning the royalty fee or distribution of royalty fees, as the case may be. Such report shall be accompanied by the written record, and shall set forth the facts that the arbitration panel found relevant to its determination.

(f) ACTION BY LIBRARIAN OF CONGRESS.—Within 90 days after receiving the report of a copyright arbitration royalty panel under subsection (e), the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt or reject the determination of the arbitration panel. The Librarian shall adopt the determination of the arbitration panel unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title. If the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of an additional 30-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be. The Librarian shall cause to be published in the Federal Register the determination of the arbitration panel, and the decision of the Librarian (including an order issued under the preceding sentence).

The Librarian shall also publicize such determination and decision in such other manner as the Librarian considers appropriate. The Librarian shall also make the report of the arbitration panel and the accompanying record available for public inspection and copying.

(g) JUDICIAL REVIEW.—Any decision of the Librarian of Congress under subsection (f) with respect to a determination of an arbitration panel may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. If no appeal is brought within such 30-day period, the decision of the Librarian is final, and the royalty fee or determination with respect to the distribution of fees, as the case may be, shall take effect as set forth in the decision. When this title provides that the royalty rates or terms that were previously in effect are to expire on a specified date, any adjustment by the Librarian of those rates or terms shall be effective as of the day following the date of expiration of the rates or terms that were previously in effect, even if the Librarian's decision is rendered on a later date. The pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under sections 111, 112, 114, 115, 116, 118, 119, or 1003 who would be affected by the determination on appeal to deposit the statement of account and royalty fees specified in those sections. The court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner. If the court modifies the decision of the Librarian, the court shall have jurisdiction to enter its own determination with respect to the amount or distribution of royalty fees and costs, to order the repayment of any excess fees, and to order the payment of any underpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment. The court may further vacate the decision of the arbitration panel and remand the case to the Librarian for arbitration proceedings in accordance with subsection (c).

(h) ADMINISTRATIVE MATTERS.—

(1) DEDUCTION OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM ROYALTY FEES.—The Librarian of Congress and the Register of Copyrights may, to the extent not otherwise provided under this title, deduct from royalty fees deposited or collected under this title the reasonable costs incurred by the Library of Congress and the Copyright Office under this chapter. Such deduction may be made before the fees are distributed to any copyright claimants. In addition, all funds made available by an appropriations Act as offsetting collections and available for deductions under this subsection shall remain available until expended. In ratemaking proceedings, the reasonable costs of the Librarian of Congress and the Copyright Office shall be borne by the parties to the proceedings as directed by the arbitration panels under subsection (c).

(2) POSITIONS REQUIRED FOR ADMINISTRATION OF COMPULSORY LICENSING. — Section 307 of the Legislative Branch Appropriations Act, 1994, shall not apply to employee positions in the Library of Congress that are required to be filled in order to carry out section 111, 112, 114, 115, 116, 118, or 119 or chapter 10.

§ 803 · Institution and conclusion of proceedings[5]

(a)(1) With respect to proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in sections 112, 114, 115, and 116, and with respect to proceedings under subparagraphs (A) and (D) of section 801(b)(2), during the calendar years specified in the schedule set forth in paragraphs (2), (3), (4), and (5), any owner or user of a copyrighted work whose royalty rates are specified by this title, established by the Copyright Royalty Tribunal before the date of the enactment of the Copyright Royalty Tribunal Reform Act of 1993, or established by a copyright arbitration royalty panel after such date of enactment, may file a petition with the Librarian of Congress declaring that the petitioner requests an adjustment of the rate. The Librarian of Congress shall, upon the recommendation of the Register of Copyrights, make a determination as to whether the petitioner has such a significant interest in the royalty rate in which an adjustment is requested. If the Librarian determines that the petitioner has such a significant interest, the Librarian shall cause notice of this determination, with the reasons therefor, to be published in the Federal Register, together with the notice of commencement of proceedings under this chapter.

(2) In proceedings under section 801(b)(2)(A) and (D), a petition described in paragraph (1) may be filed during 1995 and in each subsequent fifth calendar year.

(3) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 115, a petition described in paragraph (1) may be filed in 1997 and in each subsequent tenth calendar year or as prescribed in section 115(c)(3)(D).

(4)(A) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 116, a petition described in paragraph (1) may be filed at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire and are not replaced by subsequent agreements.

(B) If a negotiated license authorized by section 116 is terminated or expires and is not replaced by another such license agreement which provides permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending March 1, 1989, the Librarian of

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7), D.C. Circuit Rule 32(a) and this Court's briefing order of April 4, 2003, I hereby certify that excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 9,961 words, as calculated by my word processing system. This brief has been prepared in a proportionally spaced typeface using 12-point Times New Roman font, in compliance with the typeface and type style requirements of Fed. R. App. P. 32(a)(6) and D.C. Circuit Rule 32(a)(1).

Michele J. Woods

CERTIFICATE OF SERVICE

I, Daniel Lee, hereby certify that I have served two copies of the foregoing Brief for Petitioners, this 8th day of July, 2003, by first class mail, to the following counsel of record:

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* Due to problems with U.S. mail delivery to government offices, the brief has been served on July 8 by email, and two copies will be hand-delivered on July 9.